SUPREME COURT U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No. ~~172~~ 7

UTAH POULTRY & FARMERS COOPERATIVE, ARMOUR AND COMPANY, AND SWIFT & COMPANY,
Appellants,
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

STATEMENT AS TO JURISDICTION

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil Action No. C 8-53

UTAH POULTRY & FARMERS COOPERATIVE,
A UTAH CORPORATION,
Plaintiff,

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION,
Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Utah Poultry & Farmers Cooperative, plaintiff-appellant, and Armour and Company and Swift & Company, intervening plaintiff-appellants, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order and judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court has not yet been reported. A copy of the opinion and final judgment are attached hereto as Exhibit A.*

* (Clerk's Note. The opinion and final judgment are printed as an appendix to the statement as to jurisdiction in No. 174 and are not reprinted here.)

Jurisdiction

(a) This is an action brought by the plaintiff pursuant to 28 U. S. C. (1952 ed.), Secs. 1336, 1398, 2284, and 2321-2325, to enjoin, set aside, and annul an order of the Interstate Commerce Commission. Armour and Company and Swift & Company intervened and are parties under 28 U. S. C. (1952 ed.), Sec. 2323 and Rule 24(a) of the Rules of Civil Procedure.

(b) The final order of the 3-judge District Court dismissing the complaint was entered on March 10, 1954. A petition for appeal was presented herewith and allowed on May 7, 1954.

(c) The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. (1952 ed.), Secs. 1253 and 2101 (b).

The following decisions among many others sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

American Trucking Assns. v. *United States*, 326 U. S. 77; *Alabama G. S. R. Co.* v. *United States*, 340 U. S. 216; and *American Trucking Associations* v. *United States*, 344 U. S. 298.

Questions Presented

All points raised by the Assignment of Errors are presented by this appeal, but the major issues may be formulated as follows:

1. Whether a tariff rule which provides that no claim for damage to eggs shall be allowed where the physical damage to the eggs at destination does not exceed certain percentages, and that where damage does exceed such percentages, claims shall be allowed only for the damage in excess of such percentages is a limitation of railroad liability under Section 20 (11) of Part I of the Interstate Commerce Act, and therefore unlawful and void.

2. Whether the Interstate Commerce Commission's decision and order approving tariff rules which purport to relieve railroads from all liability for damage to shipments up to certain percentages of the eggs shipped are adequately supported by the Commission's findings and by substantial evidence on the record as a whole.

Statutes Involved

This appeal involves the interpretation of various sections of the Interstate Commerce Act, as amended (49 U. S. C., et seq.), particularly Section 20 (11) and the National Transportation Policy preceding Section 1 of the Act.

By order dated July 23, 1948, division 2, on its own motion instituted an investigation into and concerning the reasonableness and otherwise lawfulness of the special regulations governing descriptions, marks, inspection and delivery, and the handling of claims thereunder in conection with the transportation in interstate or foreign commerce, of shell eggs from, to, and between points in the United States, with a view to making findings and prescribing reasonable rules, regulations, and practices relative to such transportation. *Special Regulations, Eggs*, 284 I. C. C. 377, 378).

On and prior to that date, applicable tariff provisions contained no limitation of the railroads' liability for damage to eggs, other than to "current receipts", which are run-of-the-nest eggs before they are subjected to candling, grading, segregation of damaged eggs, and repacking (id. p. 383.)

Up to that time, with respect to current receipts, the tariffs provided that "if not more than five percent (5%) of the eggs are damaged, no claim will be allowed. Where damage exceeds five percent (5%), claims shall be allowed for all damage in excess of five percent (5%) if investigation develops carrier's liability." (id. p. 404).

Effective July 24, 1948, the railroads published schedules extending the above-5 percent limitation provision to "rehandled and repacked" and "storage packed eggs" where the eggs were repacked at points not located on a railroad. (id. p. 381.) Those schedules were protested by certain parties, and although the Commission permitted them to become effective without suspension, it instituted the above-mentioned investigation one day prior to the schedules' effective date. (id. p. 380.)

There are very few rail shipments of current receipts. The Commission took note of the shippers' evidence in the following language: "Protestants take the position that such eggs are not shipped commercially, particularly to the New York market." (id. p. 383). Thus, the so-called "tolerance" in effect prior to the institution of such investigation, which culminated in this case, involved only "run-of-the-nest" eggs, many of which admittedly are broken, cracked, stained, etc; and shippers were not affected by such rule nor interested particularly in its existence or non-existence, since very few current receipts were shipped.

Utah Poultry & Farmers Cooperative, Armour and Company, Swift & Company, and other shippers and shipper organizations appeared as parties and offered evidence in the investigation proceedings before the Commission.

While the general investigation was pending, and after the schedules had been permitted to become effective which applied the 5 percent tolerance to eggs graded and packed at plants not located on a railroad, the railroads filed additional tariff schedules extending the so-called "tolerance" limitations to all rail shipments of eggs, regardless of their character, and wherever they originated. These new proposed regulations published a 6 percent "tolerance" on shipments of all kinds of eggs except those placed in packages at rail points of origin, on which a 4 percent "tolerance" was published. These new rules also provided that

where bona fide certificates of Federal and State Egg-inspection agencies showed the extent of the physical damage to eggs at their rail point of origin immediately prior to tender for rail transportation, then in lieu of the 4 and 6 percent, there should be applied the percentage of actual damage as shown on such certificates, plus 1 percent. (*Id.* p. 382.)

Such new schedules were suspended by the Commission and the Suspension proceeding was consolidated with the general investigation for hearing and disposition. (*id.* p. 378.) The tariff provisions in effect immediately prior to July 24, 1948, and those which were filed during the hearings and suspended are found in Special Regulations, Eggs, 284 I. C. C. 377, 403-408.

On February 4, 1952, the Commission issued its report and order in *Special Regulations, Eggs*, 284 I. C. C. 377, in which it found that tolerances of 3 and 5 percent respectively would be reasonable, and ordered the discontinuance of its investigation and required cancellation of the suspended schedules without prejudice to the filing of new schedules publishing tolerances of 3 and 5 percent respectively (*id.* p. 403).

Thereafter Utah Poultry & Farmers Cooperative filed its complaint in the present case, seeking to have the Commission's order of February 4, 1952, set aside, annulled and enjoined. Intervening complaints were filed by Armour and Company, Swift & Company, and the Secretary of Agriculture of the United States.

The Questions Are Substantial

This case involves questions which are of great importance to the producers, shippers, and consignees of eggs, of course, because the tariff rules approved by the Commission force the members of that industry to bear a substantial share of the damage previously borne by railroads in con-

nection with egg shipments damaged in transit. From that standpoint alone the case is deserving of the time and attention of the Supreme Court. Even more important is the fact that the questions involve basic principles of railroad liability for damage to commodities generally in the course of transportation and interpretations of Section 20(11) of the Interstate Commerce Act which affect the legal rights of all shippers of commodities susceptible to damage in transit.

I

It is axiomatic that the implied agreement of common carriers is to carry safely, and that under the common law, the carrier is absolutely liable for the safety of property transported except for damage caused by the Act of God, the public enemy, the act of the shipper himself, public authority, or the inherent vice or nature of the goods. Section 20 (11) of the Interstate Commerce Act provides that the carrier shall be liable to the lawful holder of the bill of lading "*for the full actual loss, damage, or injury to such property caused by it* or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States * * *, *notwithstanding* any limitation of liability or *limitation of the amount of recovery* or representation or agreement as to value in any such receipt or bill of lading or in any contract, rule, *regulation or in any tariff filed with the Interstate Commerce Commission* and any such limitation *without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void:* * * * (emphasis supplied).

In effect, the lower court has construed the words "caused by it", as used by Congress, to mean that the common law obligations of the carrier were changed and reduced by Section 20 (11):

In *Chicago, M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, the Supreme Court held in effect that Section 20(11) means exactly what it says, and struck down a Commission rule which sought to establish a different measure of damages than that of the common law. See also *Yazoo & M. V. R. Co.* v. *Delta Grocery & Cotton Co.*, 1924, 98 So. 777, 134 Miss. 846; *Wood & Co.* v. *Chicago, M. & St. P. Ry. Co.*, 1926, 151 N. E. 229, 320 Ill. 341. Obviously the words "caused by it" were not intended to mean "caused by its negligence", but were inserted in Section 20(11) merely to distinguish damage occurring in transit from that resulting from the Act of God or one of the other excepted causes.

II

Closely connected with the above point is the holding by the Commission, affirmed by the lower court, that a certain percentage of the damage discovered in each damaged shipment is attributable solely to "inherent vice" of eggs. The only condition of the eggs to which the phrase "inherent vice" conceivably may be applied is their fragility. However, practically every commodity which moves is fragile to a degree. Breakage to eggs occurs only through application of force from the outside. If eggs possess an inherent vice merely because of fragility then so does every other commodity which can be broken by the application of outside force, even iron forgings. The fact that damage claims on egg shipments to the south, southwest, and Pacific Coast have not increased (284 I. C. C. 385-6) and that in the transportation of eggs by motor truck the amount of damage is negligible (*id.* p. 400) indicates that whatever the Commission referred to as "inherent vice" exists only in those eggs transported by rail to New England and Trunk Line Territories; and indeed, bearing in mind the low level of claims on shipments even to those territories in prior years, it may be said with assurance also that the "inherent vice", if it

exists, is something which has developed only in recent years.

III

Final proof of the unlawfulness of the so-called "tolerances" is found in the fact that the 4 percent (or the 6 percent) is applied to every egg shipment, whether it consists of run-of-the-nest eggs or the most carefully selected eggs. Obviously the condition of any car of eggs depends upon the care with which the eggs are selected and packed; and the numbers of eggs which are stained, checked and broken in any shipment are never the same. As pointed out by Judge Knous in his dissenting opinion, one shipper who sends a carload of eggs containing 2 percent checked or cracked eggs collects the same amount as another shipper who sends a carload of eggs, 5 percent of which are checked or cracked, if the contents of both cars are destroyed or damaged as a consequence of the carrier's negligence, regardless of their condition at origin.

As a matter of fact the Commission has stated many times that it has no jurisdiction over loss and damage claims. For example, in Bills of Lading, 52 I.C.C. 671, 685, it said:

> "The liability of common carriers for the loss of, or damage to, shipments rests upon definite legal principles, and the enforcement of such liability is not within the jurisdiction of the Interstate Commerce Commission. *Lost or Damaged Freight Replacement*, 43 I.C.C., 257. It can not direct the payment of a loss-and-damage claim, since the failure to pay would not be a violation of the act to regulate commerce. *Larkin Co. v. Erie & Western Transportation Co.*, 24 I.C.C., 645. The Commission is merely the instrument of the law. Its functions are administrative and quasi-judicial. Its authority to prescribe and impose upon carriers the terms and conditions which they shall write into their bills of lading is limited (1) by the common law; that is, the Commission in no event could impose upon the car-

riers the assumption of any greater liability than the common law imposes upon them; and, (2) by the statutory law, since the Commission's power and authority springs from and is limited by the organic act."

Other cases of similar import are: *Lost or Damaged Freight Replacement*, 43 I.C.C. 257, 258, *Rosser & Fitch v. A.C.L.R.R. Co.*, 91 I.C.C. 611, *S. Landow & Company, Incorporated v. Boston & Maine Railroad*, 208 I.C.C. 669-670.

When an egg shipment arrives in damaged condition at destination the extent of the damage and its source are matters that depend upon the facts in connection with the particular shipment. Nevertheless, the Commission, which itself admits that it has no jurisdiction over loss and damage claims, has promulgated a decision under which it made a sweeping finding of fact designed to apply to every future egg shipment, that all egg shipments contain certain fixed percentages of "damage" when tendered to railroads; that of all damage found at destination, those fixed percentages of eggs were not damaged in transit, but existed when the shipment was tendered to the carrier, (under the tariff rule which the Commission approved, this presumption of fact applies even though the ends of the egg cases are mashed in and the contents of the end layer of eggs are exuding). Even if Section 11 (20) of the Act did not exist and if the Commission had power to make such an order, its promulgation would constitute a gross abuse of discretion.

IV

The findings of the lower court are contrary to the evidence on the record as a whole. Merely as an example, if it were assumed that any tolerance were justified, the record is barren of evidence which would justify a difference of 2% in the "tolerance" as between eggs graded at rail points and those graded at other origins.

Conclusion

The questions presented by this appeal are substantial and of public importance. The Supreme Court of the United States should note jurisdiction of this appeal, the judgment of the District Court should be reversed, the Commission's order of February 4, 1952, should be set aside and enjoined, and the Commission should be directed to strike the assailed tariff rule from its files.

Respectfully submitted,

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